

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

ENTERED

SEP 13 '00

U.S. Bankruptcy Court
Greensboro, NC

CPH

IN RE:)
)
Azalea Garden Board and Care,) Case No. 97-50365C-11W
Inc., d/b/a Brookside of)
Winston-Salem,)
)
Debtor.)
)

ORDER GRANTING MOTION TO RECOVER
ON BOND POSTED FOR STAY PENDING APPEAL

This matter coming on to be heard, after notice to all parties in interest, on August 31, 2000, in the United States Bankruptcy Court in Winston-Salem, North Carolina, to consider the Motion to Recover on Bond Posted for Stay Pending Appeal (the "Motion") filed by WRH Mortgage, Inc. ("WRH") which seeks to recover the bond deposited by Azalea Garden Board and Care, Inc. ("Debtor") and, considering the evidence presented, the official court file and the arguments of counsel, this Court finds the following facts:

1. On April 1, 1998, the Bankruptcy Court entered an Order and Memorandum Opinion in this case which found that the Debtor was in default under the confirmed Plan of Reorganization in this case and that "WRH is entitled to proceed with foreclosure and WRH is entitled to receive all documents that Debtor's counsel presently holds in escrow." The documents held in escrow by counsel for the Debtor included a deed in lieu of foreclosure for a tract of real

property owned by the Debtor in Forsyth County, North Carolina, and a bill of sale for certain personal property located thereon. Both of these documents had been executed by the Debtor and delivered to the escrow agent pursuant to the confirmed Plan of Reorganization.

2. The property described in the deed in lieu of foreclosure and bill of sale consists of a 120 bed operating rest home on a ten acre tract of land located at 2560 Willard Road, Winston-Salem, North Carolina.

3. The obligations secured by the deed of trust held by WRH and by the deed in lieu of foreclosure and bill of sale included a payment of \$2,750,000.00 which came due on December 31, 1998.

4. The April 1, 1998 Order was appealed to the District Court by the Debtor. On June 2, 1998, the District Court entered a Memorandum Opinion staying the effect of the April 1, 1998 Order pending appeal to the District Court and, as a condition of that stay, the District Court required that the Debtor provide a supersedeas bond in the amount of \$100,000.00, which sum was to be paid by the Debtor into the Office of the Clerk of the District Court. Subsequent to June 2, 1998, the Debtor deposited the required \$100,000.00 with the Clerk of District Court.

5. On December 7, 1998, the District Court affirmed the April 1, 1998 Order under which WRH was entitled to receive the

deed in lieu of foreclosure and bill of sale. The Debtor appealed the decision of the District Court to the Fourth Circuit Court of Appeals and sought a stay of the December 7, 1998 judgment.

6. On February 12, 1999, the District Court entered an Order which stayed the effect of the December 7, 1998 judgment pending appeal to the Fourth Circuit. The conditions of the February 12, 1999 Order required that the Debtor provide an additional supersedeas bond consisting of a \$29,641.87 payment to the Clerk of District Court, continuation by the Debtor of monthly payments of \$20,000.00 into a trust account for the benefit of WRH, and continued retention by the Clerk of District Court of the \$100,000.00 supersedeas bond previously paid to the Clerk of District Court as the supersedeas bond for the stay of the April 1, 1998 Order.

7. On March 8, 1999, this court entered an order adjudging that additional defaults had occurred under the Plan of Reorganization and that WRH was entitled to receive the deed in lieu of foreclosure and bill of sale as a result of such defaults. The Debtor sought a stay of this order from this court. On March 18, 1999, this court entered an order in which this Court required as a supersedeas bond for the stay of this Court's order of March 8, 1999, that the monthly \$20,000.00 payments made for

January, February and March 1999 be transferred from the trust account of counsel for the Debtor to the Bankruptcy Clerk, that an additional \$5,000.00 be paid by the Debtor on or before March 31, 1999, and that beginning with April of 1999, the Debtor make monthly payments of \$25,000.00 to the Clerk of Bankruptcy Court, such payments consisting of the \$20,000.00 previously set by the District Court and an additional \$5,000.00 which was ordered by this court.

8. The December 7, 1998 judgment of the District Court affirming the April 1, 1998 Order of the Bankruptcy Court was affirmed by the United States Court of Appeals for the Fourth Circuit by unpublished per curiam opinion entered on May 31, 2000. The decision of the Fourth Circuit became final and the mandate issued on July 7, 2000.

9. Under the April 1, 1998 Order of the Bankruptcy Court, the December 7, 1998 Judgment of the District Court, and the May 31, 2000 opinion by the Fourth Circuit, it was adjudicated that WRH was entitled to delivery of the deed in lieu of foreclosure and bill of sale then held in escrow. On July 7, 2000, following delivery of the decision by the Fourth Circuit and the mandate of the Fourth Circuit, the escrow agent for the Debtor delivered the deed in lieu of foreclosure and bill of sale to counsel for WRH,

the deed was recorded with the Forsyth County Register of Deeds, and WRH became the owner of the real and personal property conveyed by those instruments.

10. When the District Court was asked by the Debtor to stay the April 1, 1998 Order (and later, to stay the December 7, 1998 Judgment) pending appeal, the District Court determined that the relief afforded by the Order and Judgment (i.e., the right to foreclose and the right to receive a deed and a bill of sale in lieu of foreclosure) was equivalent to a money judgment, and that the Debtor therefore was entitled to a stay as a matter of right provided the Debtor furnished a supersedeas bond in the amount or upon the conditions required by the District Court. In setting the amount of the supersedeas bond, the District Court specifically included the following:

- a. Continuation of the initial cash bond of \$100,000.00 which was required as a supersedeas bond regarding the earlier stay granted by the District Court;
- b. Continuing monthly payments of \$20,000.00 were required to be deposited in the trust account of Debtor's counsel; and

c. Recognizing that taxes were accruing, that insurance was to be maintained, and that the property was to be preserved and maintained, all of which were the responsibility of the Debtor, an additional, immediate cash payment of \$29,641.87 was required, such amount being the amount which was outstanding for ad valorem taxes and insurance premiums as of the date of the February 12, 1999 Order.

11. The orders entered by the District Court with respect to the stay pending appeal were supplemented by this Court as noted above, increasing the amount of the monthly deposit by \$5,000.00 per month beginning in March of 1999, and directing that the deposits be transferred from the trust account of Debtor's counsel to the Clerk of the Bankruptcy Court, and that future deposits of \$25,000.00 per month be made to the Clerk of the Bankruptcy Court as part of the supersedeas bond.

12. But for the stays imposed by the various orders noted hereinabove, WRH would have received delivery of the deed in lieu of foreclosure and the bill of sale on or about April 1, 1998, and would have had the use and the benefit of the real and personal property from that date. However, as a result of the appeals filed

by the Debtor and the stays obtained by the Debtor in connection with those appeals, WRH has been deprived of the possession and use of the real and personal property, while the Debtor has continued to enjoy the use and possession of the real and personal property, including the rents and profits resulting from the use and possession of the real and personal property. At the same time, the \$2,750,000.00 which came due on December 31, 1998, under the Plan of Reorganization remained unpaid.

13. WRH has not received any payment or benefit from the Debtor since December of 1998 in connection with the Debtor's continued use and possession of the real and personal property.

14. Various orders of this Court and of the District Court have noted that the Debtor was obligated to pay the ad valorem property taxes for the real property pursuant to the Plan of Reorganization and that such obligation continued during the pendency of the appeal. These taxes have not been paid and there is an outstanding ad valorem tax obligation to Forsyth County for the real property in the amount of \$65,972.81 as of July, 2000, which taxes are a statutory lien upon the property. Such taxes accrued during the stays obtained by the Debtor and WRH is entitled to recover such taxes from the bond posted by the Debtor. The aforesaid amount of \$65,972.81 includes only the statutory interest

and penalties imposed by the Forsyth County Tax Collector, and no additional interest has been requested by WRH or imposed on the Debtor.

15. Various orders of this Court and of the District Court have noted that the Debtor was obligated to maintain insurance on the real property pursuant to the Plan of Reorganization and that such obligation continued during the pendency of the appeals. The Debtor failed to provide insurance on the real and personal property during the pendency of the appeals, as a result of which WRH was required to advance and pay insurance premiums in the amount of \$5,521.00. With interest thereon at the federal rate, WRH is entitled to recover \$6,192.67 from the supersedeas bond based upon the insurance premiums paid by WRH.

16. During the pendency of the appeal, the Debtor allowed an intervening judgment lien to be recorded against the real property. Although the Debtor contended that the judgment was subject to avoidance or challenge, the Debtor has made no effort to avoid or challenge the judgment, which remained a lien upon the real property superior in priority to the subsequently recorded deed in lieu of foreclosure. The intervening judgment, including costs and interest at the statutory rate, is \$7,152.66, and WRH is entitled to recover that amount from the supersedeas bond.

17. One of the purposes of a supersedeas bond which is posted to stay enforcement of a money judgment is to protect the appellee from loss and damage which results from the delay in payment or collection of the judgment occasioned by the appeal and stay. See generally United States v. Mansion House Center Redevelopment Co., 682 F. Supp. 446, 450 (E.D. Mo. 1988) (supersedeas bond "provides a guarantee that the appellee can recover from the appellant the damages caused by the delay incident to the appeal"). This same principle applies in the present case because, as recognized in orders of the District Court, the April 1, 1998 Order and the December 7, 1998 Judgment are equivalent to a money judgment. Thus, WRH is entitled to recover under the supersedeas bond for the loss sustained as a result of the delay in WRH receiving the deed in lieu of foreclosure and bill of sale which was caused by the appeals and stays obtained by the Debtor. The evidence established that WRH did not have possession of the real or personal property during the pendency of the appeals and that WRH was not able to generate rents or income or otherwise benefit from the property as a result. Accordingly, WRH suffered damage and loss by reason of the delay in receiving possession of the property from April 1, 1998 until July 7, 2000. An appropriate way to measure such loss is to utilize the fair rental value of the property as the measure

of the loss sustained. See Metz v. United States, 130 F.R.D. 458 (D. Kan. 1990). The evidence presented showed and this Court finds that the fair rental value of the property during the period from April 1, 1998 until July 7, 2000, was at least \$20,000.00 per month. Additionally, the Debtor and WRH, through negotiations between them in connection with the formulation of the confirmed Plan of Reorganization in this case, mutually agreed that \$20,000.00 per month was an appropriate monthly payment for the Debtor in connection with the use and occupancy of the real and personal property during the period from November of 1997 through December of 1998. The monthly payments of \$20,000.00 requested by WRH at the hearing of this matter are consistent with the fair rental value of the property, as well as the amount of the monthly payments which the parties agreed on in the Plan of Reorganization, and therefore should be allowed as a claim against the supersedeas bond.

18. WRH has not received any monthly payments since December of 1998. Because WRH has had neither the use or occupancy of the real and personal property nor the use of the monthly payments, WRH is entitled to interest on those monthly payments from the date on which each payment was due at the appropriate federal interest rate.

19. Through the date of the recording of the deed in lieu of foreclosure and the delivery of the bill of sale, WRH was deprived of the use and occupancy of the property for 19 months. At the rate of \$20,000.00 per month, WRH is entitled to receive \$380,000.00 in principal and \$17,058.91 in interest for a total of \$397,058.91 as a result of being deprived of the use and benefit of the real and personal property during the pendency of the appeals by the Debtor.

20. Pursuant to the Order of this Court of March 18, 1999, the Clerk of the United States Bankruptcy Court, as of July 31, 2000, had received from the Debtor and held the sum of \$452,119.79, which included interest earned as of such date while the funds have been on deposit with the Clerk, less certain statutory fees. The evidence presented by WRH established that WRH has sustained loss and damage of at least the sum of \$476,377.05. Since this amount is in excess of the funds held by the Bankruptcy Clerk, WRH is entitled to receive all of the proceeds held by the Bankruptcy Clerk.

21. This Court has not considered and makes no finding as to any claims which WRH may assert against the supersedeas bond proceeds remaining on deposit with the Clerk of the District Court. In particular, this Court makes no finding as to:

- a. The waste and damage, if any, to the real or personal property which was the subject of the April 1, 1998 Order caused by or resulting from the continued use and occupancy of the property by the Debtor during the pendency of the appeal.
- b. The fees and costs incurred by WRH in connection with the appeals by the Debtor.
- c. The fees and costs incurred by WRH in compelling the cancellation of the two intervening deeds of trust recorded by the Debtor on January 11, 1999, a date subsequent to the entry of the order which stayed the April 1, 1998 Order (which stay prevented recordation of the deed) and subsequent to the commencement of the second bankruptcy proceeding.

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. The Court has jurisdiction over the parties and the subject matter now before the court.

2. WRH is entitled to receive from the Clerk of the Bankruptcy Court the entire supersedeas bond proceeds held by the Clerk because the damage and loss sustained by WRH as a result of the Debtor's appeals exceed the amount of the supersedeas bond proceeds held by the Clerk of the Bankruptcy Court.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered as follows:

1. The Motion to Recover on Bond Posted for Staying Pending Appeal filed by WRH is granted, and WRH is entitled to recover the entire supersedeas bond held by the Clerk of the Bankruptcy Court because the allowable claim under the bond is at least \$476,377.05 based upon WRH being deprived of the use and occupancy of the real and personal property by the Debtor pending the appeal, the unpaid ad valorem taxes relating to the real and personal property, the insurance premiums advanced by WRH during the pendency of the appeal, and the intervening judgment lien entered against the property;

2. The Bankruptcy Clerk is directed to pay to WRH the entire supersedeas bond held by the Clerk, including all interest accrued thereon, less any statutory fees; and

3. This Order is without prejudice to the rights of WRH to seek further and additional recovery in the District Court from the

supersedeas bond proceeds on deposit with the Clerk of District Court.

This 13th day of September, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge